

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MIGUEL ALICIA,

Petitioner,

v.

JOHN KARESTAS,

Respondent.

: CIVIL ACTION
: NO. 07-03183
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FILED

AUG 28 2008

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

O R D E R

AND NOW, this 27th day of **August 2008**, upon consideration of the Report and Recommendation of United States Magistrate Judge M. Faith Angell (doc. no. 20), petitioner's objections thereto (doc. no. 23), and respondent's responses to petitioner's objections (doc. no. 24), it is hereby **ORDERED** as follows:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;¹

¹ Petitioner objects to Magistrate Judge Angell's conclusion that his habeas petition is time barred. Petitioner asserts that equitable tolling should be applied to toll the statute of limitations period applicable to his federal habeas petition.

A brief recount of the procedural history of petitioner's habeas petition is summarized as follows. On April 16, 1999 petitioner was found guilty of involuntary deviate sexual intercourse ("IDSI"), incest, and corrupting the morals of a minor. On October 6, 1999, petitioner was sentenced to seventeen and a half to thirty-five years incarceration.

The Pennsylvania Superior Court affirmed the judgment of the sentence on May 7, 2001. The Pennsylvania Supreme Court denied petitioner's petition for allowance of appeal on October

9, 2001. Petitioner filed a timely petition for collateral relief under the Post Conviction Relief Act ("PCRA") on January 3, 2003. PCRA dismissed the petition without a hearing on October 29, 2004. The Pennsylvania Superior Court affirmed the dismissal on October 5, 2006. The Pennsylvania Supreme Court denied the petition for allowance of appeal on March 20, 2007. Petitioner filed the instant habeas petition on August 2, 2007.

In petitioner's habeas petition, he asserts the following arguments: (1) fundamentally unfair trial in violation of the Fourteenth Amendment because the trial court permitted Commonwealth's expert medical witness to testify concerning statistics on lack of visible injury in a child victim who claimed sexual abuse; (2) unconstitutionally excessive sentence because it exceeded the maximum sentence that the legislature intended; (3) ineffective assistance of counsel; and (4) actual innocence. (doc. no. 1).

Pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996, a person in custody as a result of a state court judgment must file his federal habeas petition within a one-year statute of limitation. 28 U.S.C. §2241(d)(1). This limitation period begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Id. at §2241(d)(1)(A). However, this limitation is subject to both statutory and equitable tolling.

Because petitioner's conviction became "final" on January 7, 2002 (ninety days after the Pennsylvania Supreme Court denied petition for allowance of appeal), petitioner's one year statutory limitation period required him to file his petition for federal habeas by January 6, 2003. However, when petitioner filed his PCRA petition on January 3, 2003, three days before the expiration of the statutory period, the period was statutorily tolled until March 20, 2007, when the Pennsylvania Supreme Court denied the petition for allowance of appeal. Statutory tolling provides that "the time that a properly filed application for state post-conviction or other collateral relief with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation." 28 U.S.C. § 2244(d)(2).

Accordingly, the remaining three days in petitioner's statutory limitation period to file his federal habeas petition began to run on March 21, 2007. As such, the petitioner was required to file his federal habeas petition by March 24, 2007 to avoid being time barred. Petitioner did not file by this date, but instead filed the petition on August 3, 2007.

Petitioner asserts that his failure to file by March 24, 2007, does not in fact make his petition untimely because the limitation should be equitably tolled. Equitable tolling is available only when "the principle of equity would make the rigid application of a limitation period unfair." Meritt v. Blaine, 326 F.3d 157, 168 (3d Cir. 2003) (internal quotations omitted). To qualify for equitable tolling, the petitioner must show: (1) the existence of extraordinary circumstances that prevented him from asserting his rights; and (2) that he exerted reasonable diligence in investigating and bringing his claims. Id.

In his objections, petitioner provides two justifications which he alleges create extraordinary circumstances for the purpose of equitable tolling: (1) "medical incapacity"; and (2) reliance upon "inmate assistance" (doc. no. 24).

First, petitioner asserts that his "medical incapacity," from March 1, 2007 through August 17, 2007, constituted an extraordinary circumstance to warrant equitable tolling. In support of this medical incapacity, petitioner alleges a rotator cuff tear, unstable angina pectoris, paroxysmal supraventricular tachycardia, and hypertension. Although the Court recognizes the existence of these conditions, the Court agrees with Magistrate Judge Angell's opinion that on this record petitioner does not meet the "extraordinary circumstance" threshold required for equitable tolling.

Second, petitioner asserts that his reliance on faulty inmate assistance constituted an extraordinary circumstance to warrant equitable tolling. Although it is not entirely clear from petitioner's objection, it appears that petitioner is citing ineffective assistance of counsel as an "extraordinary circumstance." Notably, this objection is the first time that petitioner advanced this factual basis to justify equitable tolling. Ordinarily, facts in support of claims which are not asserted in the original habeas petition, may not be presented for the first time in a petitioner's objections to the magistrate's report. See generally, 28 USCS § 636(b)(1)(C). Consequently, because facts supporting ineffective assistance of counsel as a justification for equitable tolling were not raised in the initial petition before Magistrate Judge Angell, this argument is therefore waived.

In any event, even this argument had been raised, it has no merit. Assuming his faulty "inmate assistance" would equate to assistance of counsel, in non-capital cases, "[a]ttorney error, miscalculation, inadequate research, or other mistakes" do not rise "extraordinary" circumstances required for

2. Petitioner's objections to the Report and Recommendation are **OVERRULED**;
3. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, (doc. no. 1) is **DENIED** and **DISMISSED**;
4. There is no probable cause to issue a Certificate of Appealability.²

equitable tolling. Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001). Because petitioner did not provide any substantial detail to his "inmate assistance," nor provided any insight to the effect of this advice on his ability to timely file his petition, petitioner is unable to meet the "extraordinary circumstance" threshold on this ground.

Moreover, even assuming petitioner's medical incapacity or faulty inmate advice did meet the extraordinary circumstance requirement, petitioner's lack of diligence in filing his PCRA petition and federal habeas petition indicate his failure to achieve the "reasonable diligence" necessary to trigger equitable tolling. Lacava v. Kyler, 398 F.3d 271, 277 (3d Cir. 2005) (indicating that duty to be reasonably diligent applies to both filing federal habeas claims and exhausting state remedies).

In further support of his equitable tolling argument, in petitioner's objection he asks the Court to consider Cooper v. Price, 28 Fed. Appx. 125 (3d Cir. 2002). Petitioner argues that his case is a substantially similar situation to Cooper where the Third Circuit remanded the case to the district court because the district court did not consider the petitioner's equitable tolling arguments. In Cooper, the Third Circuit remanded the case because the district court appeared to have "overlooked" the equitable tolling arguments. To the contrary, in this case, both Magistrate Judge Angell and the Court do not overlook the equitable tolling arguments, but rather apply the applicable equitable tolling standard to the facts presented.

² A prisoner seeking a certificate of appealability must demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). No basis for a certificate of appealability exists in this case, as the petitioner is unable to meet this standard.